

## **Challenging Second Half of 2023 for Swiss Start-Ups Confirms Projections**

The second half of 2023 has witnessed a significant downturn in financing rounds (-34%) and funding volume (-10%) for Swiss start-ups compared to the previous year, according to the EY Startup Barometer Switzerland. This trend was anticipated in the market, and concrete data is now available to substantiate it.

Start-up companies are feeling the pressure to secure new financing rounds on terms that are also acceptable to existing investors. This presents a complex challenge for executive management. In light of this situation, liquidity management and financial planning are becoming increasingly crucial.

Creditreform Switzerland reports that a total of 9'998 bankruptcies were registered in 2023, marking a slight decline of 1% compared to the 10'095 cases in the previous year. Out of these nearly 10'000 cases, 7'335 were due to insolvency, indicating that the affected companies were unable to settle their debts with creditors. The number of bankruptcies based on over-indebtedness rose by 8% to 6'791 cases in 2023, as per Creditreform's data.

Consequently, issues such as impending insolvency, capital losses, and over-indebtedness are gaining prominence. The new corporate law, which includes adjustments in these areas, has been in effect for over a year.

This raises questions about the provisions of Swiss contract law and the implications for company directors. What are the duties and liability issues that arise? Understanding what to watch out for and avoiding potential pitfalls is crucial.

### **Impending Insolvency and Liquidity Planning**

A company is deemed insolvent when it can no longer meet its due payment obligations. Currently, there is no clear legal precedent regarding the extent and exact timing of insolvency. Likewise, legal guidelines for the relevant financial plan and the planning period are lacking. The board of directors clearly bears the responsibility for monitoring solvency.

#### **Duties of the Board of Directors:**

- The board is required to ensure and monitor the company's ongoing solvency, which includes immediate action in the face of signs of impending insolvency.
- It must ensure that all measures are taken within the board's remit and, if necessary, appropriate motions are timely submitted to the general assembly.

**Recommendations:**

- Regular dialogue between executive management and the board regarding liquidity and financial planning.
- Liquidity and financial planning should always take into account contingent liabilities and be updated promptly.
- Strategic interventions should be initiated in time if the required liquidity is no longer available.

These recommendations aim to promote proactive financial management within the company to effectively manage financial risks and secure the company's long-term stability.

**Capital Loss and Opting-Out**

Capital loss occurs when the assets minus liabilities from the last annual account do not cover at least half of the sum of share capital, the legal capital reserve not repayable to shareholders, and the legal profit reserve. The calculation method for half the capital loss has been relaxed.

Since 1.1.2023, the presence of a half capital loss is particularly associated with new obligations for companies that have opted for an opting-out and thus waived an audit. For such companies, the presence of the capital loss triggers a statutory audit obligation, specifically impacting the duties of the board of directors.

**Duties of the Board of Directors (for companies without an Opting-Out):**

- In the event of a confirmed capital loss, the board must take immediate steps to remedy the capital loss.
- The board is urged to take additional recovery measures if needed or submit appropriate proposals to the general assembly if they fall within the assembly's remit.
- A subordination alone is not considered a recovery measure but merely exempts from the obligation to report over-indebtedness to the court.

**Recommendations:**

- Calling a recovery general assembly is only necessary when resolutions of the general assembly are required, thus contributing to efficient proceedings.
- Consider the tax implications when evaluating possible recovery measures.

These guidelines and recommendations emphasise the importance of proactive and diligent management by the board, particularly regarding financial stability and legal compliance.

### **Duties of the Board of Directors (for companies with an Opting-Out):**

For boards of companies that have utilised the opting-out option, an additional specific obligation exists since 1.1.2023: If the company does not have an auditor, the board must appoint a licensed auditor to subject the annual accounts to a limited audit before approval by the general assembly. Failure to conduct the limited audit renders the general assembly's resolutions on the approval of the annual accounts and the use of the balance sheet profit null and void!

An external review of whether the board has fulfilled its responsibilities in this context does not occur. However, sufficient subordinations do not exempt the board from the statutory audit obligation. An audit obligation only lapses in cases where the board files for a probate deferment.

### **Possible Consequences of Non-Compliance with the Statutory Audit Obligation:**

Since there are no precedent cases yet, uncertainty prevails in the industry regarding the potential consequences of failing to comply with the new statutory audit obligation. Specifically, the invalidity of resolutions made by the general assembly should not be taken lightly. Therefore, the urgent recommendation to the board of directors is to adhere to the statutory audit obligation and take appropriate measures.

### **Recommendations:**

- Adherence to the statutory audit obligation through timely appointment of a licensed auditor.
- Early clarification of the situation to find a suitable and available auditor.
- Proactive planning of the annual account preparation, considering all relevant legal provisions.

### **Over-indebtedness**

Over-indebtedness occurs when a company's liabilities are no longer covered by its assets. The trigger for action is not the occurrence of over-indebtedness but the justified concern of over-indebtedness.

**Duties of the Board of Directors:**

- If there is justified concern that the company's liabilities are no longer covered by its assets, the board is obliged to immediately prepare an interim balance sheet at going concern values as well as liquidation values.
- The decision on the necessity of an interim balance sheet at liquidation values depends on whether the company is assumed to continue operations. If the going concern assumption is upheld and the interim balance sheet at going concern values does not indicate over-indebtedness, an interim balance sheet at liquidation values can be omitted. If the going concern assumption is not given, an interim balance sheet at liquidation values suffices.
- These interim balance sheets are subject to an audit obligation, so the board must have them audited by the auditing body or, if none is present, by a licensed auditor.
- It should be noted that neither existing audited annual financial statements as at the balance sheet date nor sufficient subordination release the Board of Directors from the obligation to prepare and audit these interim financial statements.
- If the company is over-indebted according to both interim balance sheets, the board is obliged to notify the court. Notification can be omitted only if sufficient subordinations are present or as long as there is a justified prospect that the over-indebtedness can be remedied within a reasonable period, at most 90 days after the audited interim balance sheets are available (auditors' report date), without further endangering the creditors' claims.

**Recommendations:**

- The board must continue to take recovery measures and continuously monitor the financial situation and the coverage of subordinations.
- In cases of obvious over-indebtedness and lack of recovery intention, a simplified examination of the interim balance sheets can be conducted to save costs.
- Over-indebtedness can also be remedied by the revaluation of real estate and participations, requiring written confirmation from the licensed auditor.

## **Final Considerations and Our Consulting Offer**

Given the current challenges and the complex financial landscape in which Swiss start-ups and companies operate, the importance of sound and strategic financial management becomes increasingly important. Addressing issues such as impending insolvency, capital loss and over-indebtedness requires not only a deep understanding of legal frameworks but also proactive and forward-looking planning.

Our team offers professional consulting and support in these and other finance and company-specific matters. We understand the complexity of current economic and legal challenges and are committed to providing solution-oriented approaches tailored to the individual needs of your company.

We warmly invite you to contact us anytime for further consultation or questions. Our goal is to support you during these challenging times and contribute to securing the long-term stability and prosperity of your company.